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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 11

THE CHANDLER & PRICE COMPANY,
PETITIONER,

vs.

BRANDTJEN & KLUGE, INC., AND JOSEPH FREEMAN, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 25, 1935.

CERTIORARI GRANTED APRIL 29, 1935.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

Equity. No. 7237

BRANDTJEN & KLUGE, INC., Plaintiff,

vs.

JOSEPH FREEMAN, INC., and THE CHANDLER & PRICE COMPANY, Defendants

DOCKET ENTRIES

1934.

April 30. Plaintiff's notice of appearance and complaint filed. Subpœna issued.

May 5. Subpœna returned and filed—Served on Defendant.

June 1. Notice of appearance filed.

June 1. Order filed extending time to answer to June 25, 1934.

June 22. Notice of motion filed for leave to intervene, etc.

June 23. Order and stipulation extending time to answer to July 9, 1934.

June 27. Before Inch, J.—Hearing on motion to permit Chandler & Price Co. to intervene—motion argued—decision reserved—submitted.

June 30. By Inch, J.—Decision rendered granting motion to permit Chandler & Price Co. to intervene, etc. (see Memo attached to papers).

June 30. By Inch, J.—Order filed, entered granting leave to Chandler & Price Co. to int[illegible]ne, etc.

July 9. Answer and counterclaim filed.

July 20. Notice of motion filed to dismiss counterclaim, etc.

[fol. 2] July 25. Before Inch, J.—Hearing on motion to dismiss counterclaim—adjourned to August 1, 1934.

Aug. 1. Campbell, J.—Case called and adjourned to September 4, 1934.

Aug. 1. Campbell, J.—Hearing on motion to dismiss counterclaim—motion argued and submitted.

Aug. 10. By Campbell, J.—Decision rendered granting motion to dismiss counterclaim of Chandler & Price Co. and referring motion to vacate or-

1934,

der of June 30, 1934, to Inch, J. Settle order on notice (see Opinion Book).

Sept. 4. Campbell, J.—Case called and adjourned to September 5, 1934.

Sept. 5. Moscowitz, J.—Case called and adjourned to October Term.

Sept. 7. By Campbell, J.—Order filed and entered dismissing counterclaim, etc.

Sept. 21. Notice of motion filed for a stay, etc.

Sept. 26. Before Campbell, J.—Hearing on motion for a stay—motion argued—granted, staying trial only. Settle order on notice.

Sept. 29. By Campbell, J.—Order filed and entered staying trial.

Sept. 29. Præcipe filed.

Sept. 29. Petition for appeal and order allowing appeal, assignment of errors & bond for costs on appeal filed.

Oct. 2. Citation filed.

Oct. 2. Moscowitz, J.—Case called and adjourned to October 3, 1934.

Oct. 3. Moscowitz, J.—Case called and adjourned to November 6, 1934.

[fol. 3] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

Equity. No. E-7237. Wells and Hunter Patent No. 1,363,200

BRANDTJEN & KLUGE, INC., Plaintiff,

vs.

JOSEPH FREEMAN, INC., Defendant

BILL OF COMPLAINT

To the Honorable Judges of the United States District Court for the Eastern District of New York:

The Plaintiff for its Bill of Complaint alleges:

1. This is a suit in equity brought under the patent laws of the United States for infringement of United States

Letters Patent No. 1,363,200, issued on December 21, 1920, for Improvements in Automatic Feed and Delivery for Platen Presses.

2. The plaintiff, Brandtjen & Kluge, Inc., is a corporation organized and existing under the laws of the State of Minnesota and has its principal place of business in St. Paul, Minnesota.

3. The plaintiff is informed and believes, and therefore avers, that the defendant, Joseph Freeman, Inc., is a corporation organized and existing under the laws of the State of New York and has a regular and established place of business in Brooklyn, County of Kings, State of New [fol. 4] York, in the Eastern District of New York, within which district the acts hereinafter complained of have taken place and are now taking place.

4. On December 16, 1907, Pierson L. Wells and Frederick W. Hunter, being then citizens of the United States and residents of the Borough of Brooklyn in the City and State of New York, and being within the meaning of the statutes of the United States then in force the true, original, first and joint inventors of certain new and useful Improvements in Automatic Feed and Delivery for Platen Presses, which were not known or used by others in this country before their invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before their invention or discovery thereof, or more than two years prior to December 16, 1907, and not in public use or on sale in this country for more than two years prior to December 16, 1907, and which had not been patented or caused to be patented by them in any foreign country on an application filed more than twelve months prior to December 16, 1907, and which had not been abandoned by them, duly filed in the United States Patent Office an application for Letters Patent on said improvements.

5. On December 21, 1920, all requirements of the statutes of the United States and rules of the Patent Office of the United States then in force and applicable to the said application having been complied with, there were duly granted and issued to the Miller Saw-Trimmer Company, a Pennsyl- [fol. 5] vania corporation, on the said application of Pierson L. Wells and Frederick W. Hunter, the said Miller Saw-

Trimmer Company being then the owner by mesne assignment of all right, title and interest in and to said application and improvements, Letters Patent of the United States No. 1,363,200, dated December 21, 1920, whereby there was secured to the said Miller Saw-Trimmer Company, its successors and assigns, for the term of seventeen (17) years from December 21, 1920, the exclusive right to make, use and sell the said improvements, as will appear from said Letters Patent, or a copy thereof, to be produced in court, of which profert is hereby made.

6. On or about April 18, 1928, the name of the said corporation to which the said Letters Patent were granted was changed from Miller Saw-Trimmer Company to Miller Printing Machinery Company. On or about October 23, 1928, the said corporation, then named Miller Printing Machinery Company and being then the owner of said Letters Patent No. 1,363,200, made and executed in due form of law and delivered to Brandtjen & Kluge, Inc., the plaintiff herein, a written assignment wherein and whereby there was assigned to the plaintiff all right, title and interest in and to said improvements and Letters Patent No. 1,363,200, as will appear by reference to said written assignment or a copy thereof to be produced in court. Since on or about October 23, 1928, the plaintiff has been at all times, and is now, possessed of all the right, title and interest in and to said improvements and in and to the said Letters Pat-
[fol. 6] ent No. 1,363,200, and entitled to all the benefits thereof.

7. The said improvements have been and are of great benefit and advantage to the public, and the public generally has acknowledged and acquiesced in the validity of the said Letters Patent and the rights of the plaintiff and its predecessor in title thereunder.

8. Heretofore, on or about June 15, 1922, suit was brought by the said Miller Saw-Trimmer Company against Otto R. Schilffarth in the District Court of the United States for the Eastern District of Wisconsin for infringement of the said Letters Patent No. 1,363,200 by reason of the use of a printing press made and sold by Brandtjen & Kluge, Inc., plaintiff herein, and the cause having come on for trial in open court and having been heard on bill of complaint and answer and other pleadings, and on evidence

presented by both parties, and having been argued by counsel for both parties and briefs having been filed by both parties, and the Court being fully advised in the premises, Honorable Ferdinand A. Geiger, District Judge of the said Court, rendered an opinion and on January 18, 1928, entered a final decree sustaining the said patent, particularly claims 11, 12, 18, 19, 24, 27, 37, 40, 41, 44 and 46 thereof, and finding said claims valid and infringed. On or about February 14, 1928, an appeal was taken from the said decree by the said Otto Schilffarth to the Circuit Court of Appeals for the Seventh Circuit. On or about October 28, 1928, Brandtjen & Kluge, Inc., purchased from Miller Printing [fol. 7] Machinery Company all right, title and interest in and to the said improvements and the said Letters Patent No. 1,363,200, as set forth hereinbefore, whereupon the said appeal was dropped.

9. Since the grant of the said Letters Patent, the plaintiff and its predecessor in title, each during its respective period of ownership of the said Letters Patent, has duly marked its machines made under the said Letters Patent in accordance with the requirements of Revised Statute 4900, 35 U. S. C. A. Sec. 49, as then in force.

10. The plaintiff is informed and believes, and therefore avers, that within six years last prior to the filing of this Bill of Complaint, the defendant, Joseph Freeman, Inc., has, within the Eastern District of New York, used and caused to be used a certain automatic platen printing press, in what is known as a twelve by eighteen inch size, employing improvements described and claimed in the said Letters Patent, particularly claims 11, 12, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 37, 38, 39, 40, 42, 43 and 44 thereof, unlawfully and without license of the plaintiff and in infringement of the said Letters Patent and plaintiff's rights thereunder, and threatens to continue said infringement.

11. On or about April 2, 1934, plaintiff notified the defendant herein of its ownership of the said Letters Patent and of defendant's infringement thereof, but defendant has continued to use the said machine since that notice.

12. Plaintiff is a manufacturer and seller of printing presses and a great part of its business consists in making [fol. 8] and selling presses employing the said improve-

ments of the Wells and Hunter patent No. 1,363,200. The plaintiff has expended large sums of money in acquiring its rights in the said improvements and Letters Patent and in making them of benefit to the public and profitable to itself. But for the said infringement by the defendant and the defendant's threat to continue that infringement, plaintiff would now be able to make and sell its presses with greater profit and advantage, and if defendant's infringement should continue, the plaintiff would be irreparably damaged. The defendant has profited by the said infringement but in an amount which the plaintiff cannot ascertain without an accounting by the defendant. The plaintiff has no adequate remedy at law.

Wherefore, the plaintiff prays:

1. That a permanent injunction be issued by this Court forever enjoining and restraining the defendant, its officers, attorneys, agents, servants, workmen, employees, and each of them, from infringing or contributing to the infringement of said Letters Patent No. 1,363,200.

2. That the defendant be ordered by this Court to account for and to pay to the plaintiff all profits, gains and advantages had by the said defendant by reason of any infringement of the said Letters Patent, and that this Court assess, or cause to be assessed, and cause to be paid to the plaintiff the damages which the plaintiff has suffered by reason of any infringement of said Letters Patent by the defendant.

[fol. 9] 3. That the defendant be ordered to pay all the costs, disbursements and charges of this suit.

4. That the Court grant such other and further relief as the case may require.

Answer under oath is waived.

Brandtjen & Kluge, Inc., By Henry A. Brandtjen, Treasurer. Pennie, Davis, Marvin & Edmonds, Solicitors for Plaintiff. Pennie, Davis, Marvin & Edmonds, Dean S. Edmonds, John Hoxie, of Counsel.

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR LEAVE TO INTERVENE

To the Judges of the District Court of the United States, for the Eastern District of New York:

The Chandler & Price Company, your petitioner, respectfully alleges and shows as follows:

[fol. 10] 1. Petitioner is a corporation of the State of Ohio, having its principal office and place of business at Cleveland, in said State, where for many years past it has been engaged in the manufacture of platen and other printing presses, attachments for such printing presses, and particularly the certain automatic platen printing press known as a 12x18 inch size, the use whereof by the above named defendant, Joseph Freeman, Inc., is complained of in the bill of complaint herein.

2. The above entitled cause was commenced in this Court by the service of a writ of subpoena on Joseph Freeman, Inc., defendant herein, on the 4th day of May, 1934, but defendant has not yet filed its answer herein, nor have any other proceedings been had to date, plaintiff having agreed to an extension of time for filing such answer or other defense to and including June 8, 1934.

3. Said bill of complaint in brief alleges ownership in plaintiff, Brandtjen & Kluge, Inc., of United States Letters Patent No. 1,363,200, which issued under date of December 21, 1920, to Miller Saw-Trimmer Company, of Pittsburgh, Pa., a corporation of Pennsylvania, and charges defendant, Joseph Freeman, Inc., with having infringed said Letters Patent by using and causing to be used, within the Eastern District of New York, a certain automatic platen printing press which, as hereinbefore stated, is of petitioner's manufacture and has heretofore been sold by petitioner to said defendant.

[fol. 11] 4. Petitioner has an interest in the litigation in the above entitled cause against the plaintiff therein arising out of the following facts, viz.:

(a) Subsequently to placing on the market its aforesaid automatic platen printing press, petitioner has on a number of occasions been advised by customers of threats made by plaintiff, either directly or indirectly, that suit for patent infringement would be brought again- said customers if they purchased and/or used petitioner's aforesaid machines.

(b) As illustrative of the type of threats which have thus been made against petitioner's customers, reference is made to the attached copy of a letter, marked "Exhibit 1," dated August 24, 1933, addressed by plaintiff to the Mason Press, of Detroit, Michigan.

(c) As the result of letters such as the foregoing and verbal statements and threats to the same effect made by plaintiff and/or its authorized representatives, petitioner has in a number of instances given bonds to purchasers of its aforesaid automatic platen printing presses.

(d) Preliminarily to the bringing of the present suit against defendant, Joseph Freeman, Inc., the latter was notified by letter from plaintiff's counsel, dated March 31, 1934, of which a copy is likewise attached, marked "Exhibit [fol. 12] 2", such letter identifying the aforesaid automatic printing press complained of as of petitioner's manufacture.

(e) This notice was immediately referred by defendant to petitioner in Cleveland, who in turn referred it to its patent counsel, and the latter, on petitioner's behalf, directed an inquiry under date of April 7, 1934, to plaintiff's counsel as to whether this notice was given merely as prelude to bringing suit, after having selected the Eastern District of New York as the preferred tribunal rather than bringing suit directly against petitioner in the Northern District of Ohio. To this counsel for plaintiff replied under date of April 10, 1934, stating that decision had been reached to file suit against defendant and adding:

"The present condition of the calendar of the District Court of Brooklyn indicates that a suit for patent infringement can be reached for trial there at an earlier date than in most other districts, and that was a factor which influenced us in concluding to file suit in Brooklyn."

In accordance with further promise made in such letter of April 10, plaintiff's counsel under date of May 4, 1934, served on petitioner's counsel a copy of the bill of complaint as filed the same day in this Court.

(f) In the interval both plaintiff's counsel and Mr. Charles G. Cope, of Pittsburgh, Pa., representing plaintiff, [fol. 13] have sought through petitioner's counsel to arrange with petitioner to make available to plaintiff one of petitioner's aforesaid automatic platen printing presses in order that plaintiff might make drawings therefrom for use in this suit, and in various other ways it has been indicated that the suit is in effect directed against petitioner and that Joseph Freeman, Inc., is regarded merely as the nominal defendant.

(g) Petitioner, with full knowledge of plaintiff, has been selling automatic printing presses of the construction complained of in this suit to various of its customers throughout the United States long prior to the filing of such suit, and, as hereinbefore indicated, plaintiff threatens to bring suits against other users of said machines, thereby greatly injuring petitioner's business and unnecessarily harassing its customers.

(h) Plaintiff has never brought suit against petitioner charging it with infringement of the patent here sued on by reason of petitioner's manufacture, use and/or sale of the press herein complained of, although petitioner has manufactured and sold said presses throughout the United States long prior to the filing of the bill and with the full knowledge of plaintiff. a specimen of such press having, at plaintiff's request, been exhibited at petitioner's plant to Mr. Charles G. Cope representing plaintiff.

5. The interest of petitioner in the above entitled suit accordingly is such that its intervention in this cause is neces- [fol. 14] sary to the protection of its interests, as set forth in detail in Paragraph 4 above, because of the following facts, viz.:

(a) Defendant, Joseph Freeman, Inc., has purchased from petitioner and is using but one of the presses herein complained of, and the charge of infringement is based solely on the use of that press.

(b) Defendant, Joseph Freeman, Inc., is merely a nominal defendant and has not sufficient interest in the result of this suit to properly defend the same on its own account; whereas, petitioner has great interest in the result of the controversy in that if a decree be entered against said nominal defendant and an injunction granted, as prayed for in the bill of complaint, petitioner fears that plaintiff will pursue its other users and start suits against them, as it has threatened to do, and that a preliminary injunction will be sought in such suits on the ground of prior adjudication of the patent, all of which would tend to greatly injure the business of petitioner.

(c) Petitioner is obligated and expects openly to defend Joseph Freeman, Inc., against whom this suit is nominally brought, and plaintiff is already advised that counsel retained by plaintiff are with the consent and approval of the defendant representing the latter in this suit.

(d) Because of obligations incurred by petitioner to other [fol. 15] purchasers of its aforesaid automatic platen printing press, which forms the subject-matter of this suit, petitioner is vitally concerned in the outcome of the litigation.

(e) The suit has evidently been brought against the nominal defendant, instead of against petitioner, merely to serve plaintiff's assumed convenience.

6. Petitioner has applied for leave to intervene at the earliest possible date after being advised of the bringing of this suit and ascertaining what issues are involved therein. No action whatever has been taken in the suit beyond the filing of the bill of complaint.

Wherefore, petitioner prays that this Court make an order granting leave to petitioner to intervene as a defendant, with leave to file an answer or other defense, and for such other and further relief as to this Court seems just.

The Chandler & Price Company, by R. J. Frackelton, President. John F. Ryan, 51 East 42nd St., New York, N. Y., Solicitor for Petitioner; Wallace R.

Lane, Bankers Bldg., Chicago, Ill.; Jno. F. Oberlin, Leader Bldg., Cleveland, Ohio, of Counsel for Petitioner.

Cleveland, Ohio, June 4, 1934.

[fol. 16] *Duly sworn to by R. J. Frackelton and Joseph Freeman. Jurats omitted in printing.*

[fol. 17] EXHIBIT 1—TO PETITION FOR LEAVE TO INTERVENE

Copy Letter from Brandtjen & Kluge, Inc., Detroit Branch

August 24, 1933.

The Mason Press,
3289 Collingwood Ave., Detroit, Michigan.

GENTLEMEN:

We are writing you this letter because we want you to know that we appreciated the courtesy extended us in investigating the Kluge before making your decision in regard to an automatic press. There is some information that we feel we should give you, because of this courtesy which you have extended us, in regard to the machine which you have decided to buy. I hope you will take this in the spirit in which it is given. Had you not shown us the courtesy you did, we probably would have let you do your own worrying in regard to this particular point.

Approximately three years ago, Brandtjen & Kluge, Inc., purchased patent rights from the Miller Company. These patent rights cost us well over one-half million dollars. They covered certain basic principles which, along with the patents we already held, give us almost exclusive rights on a complete air-feed and delivery feeder on a platen type press. It was necessary for us to protect our rights once before and we found that our patents enabled us to have the protection.

Brandtjen & Kluge, Inc., I know have notified the company that manufactures the machine for which you state you have placed your order, that they consider this feeder an infringement on their patent rights and we have every [fol. 18] reason to believe that Brandtjen & Kluge will start

action because a company with an investment of close to three-quarter million dollars in patents is not going to stand by and let these patents be infringed. There is considerable to this story too that we do not care to mention here.

Now, the suggestion which we are going to make for your own protection, is that you have the manufacturer of this machine issue you a bond, and preferably insist that the man selling it to you indemnify you in case of damage. Now you may not look at this the way we look at it but we want you to know that we have been through the mill.

I am sure that you can see that if this machine is not an infringing machine that either the manufacturer or the dealer through whom you are buying the machine should have no hesitancy about so assuring you and the only assurance of which you can be positive is a guarantee to indemnify. You are not asking either of these concerns too much. Things happen fast. Four or five years ago the Miller Company was a prosperous growing concern, paying their obligations. Today they are in the hands of a receiver.

Again may we assure you that the intention of this letter is not to change your mind in regard to the equipment that you are going to buy but the information given here is given you in a friendly spirit. Should you want additional information we would be glad to have you call at the office or telephone.

Very truly yours, Brandtjen & Kluge, Inc., By C. S. Tompkins (Signed), Branch Manager.

C. S. Tompkins.
HM.

[fol. 19] Incidentally might state that this particular machine was removed from three different plants in Cleveland where they were installed—also the only plant we have record of in Detroit where this machine was installed, the unit was removed.

C. S. T.

EXHIBIT 2—TO PETITION FOR LEAVE TO INTERVENE

PENNIE, DAVIS, MARVIN AND EDMONDS

Counsellors at Law

165 Broadway

New York

March 31, 1934.

Joseph Freeman, Inc.,
94 Rogers Avenue, Brooklyn, N. Y.

SIRS:

On behalf of our client, Brandtjen and Kluge, Inc., we inform you that your use of the Chandler & Price 12x18 automatic platen printing press now at your plant constitutes an infringement of United States Letters Patent to Wells and Hunter No. 1,363,200, owned by Brandtjen & Kluge, Inc. A copy of this patent is enclosed herewith.

We trust that it will be necessary merely to call this infringement to your attention to lead you to respect our client's rights, which they must maintain.

Please let us have an answer at your earliest convenience.

Yours very truly, Pennie, Davis, Marvin & Edmonds.

[fol. 20] IN UNITED STATES DISTRICT COURT

E. 7237

BRANDTJEN & KLUGE, INC.,

vs.

JOSEPH FREEMAN, INC.

June 27, 1934.

Before Inch, J.

Motion for an order permitting Chandler & Price Co. to Intervene and be made a party defendant.

APPEARANCES

John F. Ryan, for Chandler & Price Co., for motion; Pennie, Davis, Marvin & Edmonds, for plaintiff.

Motion argued and decision reserved and submitted.

MEMORANDUM, INCH, D. J.—Filed June 30, 1934.

It now appears to be essential to the business of Chandler & Price Co., that the validity, etc., of the patent, etc., be determined and said Company will, as is arranged be bound by the Decree in this suit. Sufficient interest therein is manifest in the papers to warrant the intervention asked. Motion granted.

R. A. Inch, U. S. D. J.

June 30, 1934.

[fol. 21] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE—Filed June 30, 1934

This cause coming on to be heard on the 27th day of June, 1934, on the petition of The Chandler & Price Company for leave to intervene in the above entitled suit and to be made a party defendant thereto, and the petition having been duly considered, and it appearing to the Court that said The Chandler & Price Company has an interest in the above entitled suit sufficient to warrant it to become a party thereto;

It is therefore ordered, adjudged and decreed that said The Chandler & Price Company be and it hereby is granted leave to intervene in said suit as a party defendant.

R. A. Inch, United States District Judge.

June 30, 1934.

[fol. 22] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER—Filed July 9, 1934

The defendants, Joseph Freeman, Inc., and The Chandler & Price Company, file this, their answer to the bill of complaint herein, and say:

I

Defendants have no knowledge as to the corporate organization, existence and principal place of business of plaintiff and therefore, on information and belief, deny the allegations of the bill of complaint with respect thereto.

II

Defendant Joseph Freeman, Inc., admits that it is a corporation organized and existing under the laws of the State of New York, and that it has a regular and established place of business in Brooklyn, New York; and defendant, The Chandler & Price Company, states that it is a corpora-
[fol. 23] tion organized and existing under the laws of the State of Ohio, that it has its principal office and place of business at Cleveland, Ohio, and that it appears in this suit as co-defendant with said party Joseph Freeman, Inc., pursuant to order granting leave to intervene entered herein under date of June 30, 1934.

III

Defendants deny that they, or either of them, have committed any acts of infringement, as complained of in the bill of complaint, or otherwise, within the Eastern District of New York or elsewhere.

IV

Defendants jointly and severally deny each and every of the allegations contained in the paragraphs numbered 4 and 5 of the bill of complaint as to the improvements in automatic feed and delivery for platen presses claimed to be disclosed in and covered by said Letters Patent No. 1,363,200, asserted in the bill of complaint, and specifically

(a) Deny that the said Pierson L. Wells and Frederick W. Hunter were the original, first and joint inventors of the said alleged new and useful improvements;

(b) Deny that said improvements were not known or used by others in this country before the alleged invention thereof by said Wells & Hunter, and patented or described
[fol. 24] in any printed publication in this or any foreign country before their alleged invention or discovery thereof, or more than two years prior to their application for United States Letters Patent therefor, and that the same

were not in public use or on sale in this country for more than two years prior to their alleged application for United States Letters Patent therefor, and that the same were not patented or caused to be patented by them, or their legal representatives or assigns, in any foreign country on an application filed more than twelve months prior to the filing of their said application for patent in the United States, and that the same were not abandoned;

(c) Deny that said Wells & Hunter lawfully filed and thereafter prosecuted their alleged application for United States Letters Patent, as recited in the bill of complaint, and that Letters Patent were lawfully granted and issued thereon;

(d) Deny that there was issued to said Wells & Hunter, or their assignees, for the term of seventeen years from the date of the alleged patent, the exclusive or any right to make, use and vend the said alleged improvements throughout the United States and the territories thereof; and

(e) Deny that said patent No. 1,363,200 issued in due form of law to Miller Saw-Trimmer Company, a corporation of Pennsylvania, as assignee, or that the said Wells [fol. 25] & Hunter by an instrument in writing, duly recorded in the United States Patent Office, assigned all of their right, title and interest in, to and under the said application and the alleged invention described therein to said Miller Saw-Trimmer Company, to whom the patent was issued.

V

Defendants deny each and every of the allegations contained in paragraph numbered 6 of the bill of complaint and specifically deny that this plaintiff now has or ever has had such title in, to or under said patent No. 1,363,200, as will support its bill of complaint; deny that plaintiff has any title in, to or under the alleged improvements covered by said patent; and deny that plaintiff ever acquired any right to recovery for past infringement of said patent. Defendants allege that, on the contrary, there are other persons, firms or corporations having interest in, to or under said patent and/or improvements without whom the suit may not be fully and properly tried.

VI

Defendants deny that the said alleged improvements have been and are of great or any benefit and advantage to the public and that the public has generally or at all or in any way acquiesced in the validity of the said patent in suit.

VII

Defendants deny each and every of the allegations contained in paragraph numbered 8 of the bill of complaint [fol. 26] in manner and form as there stated, and specifically deny that the suit and/or proceeding, viz., Miller Saw-Trimmer Company vs. Otto R. Schilffarth, therein mentioned as having been brought in the United States District Court for the Eastern District of Wisconsin was vigorously contested on behalf of the party defendant, and further allege that said case was not tried on a full and complete record and that it was not fully and adequately defended, and that the decision resulting from said litigation is in no wise binding on these defendants, or either of them.

VIII

Defendants deny that the public has been given due notice by the plaintiff and its alleged predecessors in title that the alleged invention claimed and secured by the patent in suit has been patented in the manner and form prescribed by law.

IX

Defendants deny that since the date of the alleged grant of said patent in suit, they, or either of them, have unlawfully and without license of the plaintiff or at all employed, are now employing or intend to employ any of the alleged improvements described and claimed in the patent in suit, either in the claims particularly recited in paragraph numbered 10 of the bill of complaint or others; and defendants jointly and severally deny that they have at any time in any place or in any manner infringed upon said patent in suit, or any of the claims thereof, or any rights of plaintiff, or that they are now so infringing or intend so to do.

[fol. 27]

X

Replying to paragraph numbered 11 of the bill of complaint, defendant, Joseph Freeman, Inc., admits that it did duly receive through the mail a letter, dated March 31, 1934, whereof a true copy, marked "Exhibit 2", is attached to and forms a part of the petition of co-defendant, The Chandler & Price Company, for leave to intervene herein.

XI

Defendants charge and allege:

(a) That said Letters Patent No. 1,363,200 and each and every part and claim thereof here asserted are void and of no effect in law because the alleged improvements claimed to be therein described, disclosed and claimed had been, long prior to the alleged invention or discovery thereof by the said patentees Wells & Hunter, or more than two years prior to their alleged application for said patent, patented, described and fully disclosed to the public in various patents and printed publications in the United States and foreign countries;

(b) That said patentees were not the original, first and true inventors or discoverers thereof, or of any material or substantial part of the alleged improvements claimed to be patented in said patent in suit, but that said improvements had been in public use and on sale in this country for more than two years prior to the application for said patent and each and every part thereof had been invented [fol. 28] and discovered and used by and known to others in this country and elsewhere before the alleged invention or discovery or appropriation thereof by said Wells & Hunter;

(c) That in view of the prior art existing at the time, there was no invention in what said Wells & Hunter claimed to have invented; and

(d) That said alleged improvements had been abandoned and given to the public.

The following patents, names of parties mentioned in said patents, with the addresses there given, printed publications, prior users, inventors, discoverers and those having prior knowledge, are among those supporting these

defenses and to which defendants make reference and give notice, to-wit:

United States Patents:

9,410, S. P. Ruggles, Nov. 16, 1852;
12,118, D. Baldwin, Jan 2, 1855;
182,146, J. T. & F. Ashley, Sept. 12, 1876;
203,709, C. B. Cottrell, May 14, 1878;
208,796, C. B. Cottrell, Oct. 8, 1878;
209,683, J. Hird, Nov. 5, 1878;
393,978, J. T. Hawkins, Dec. 4, 1888;
406,059, L. Orser, July 2, 1889;
497,484, R. S. Anderson, May 16, 1893;
499,749, J. R. McDonald, June 20, 1893;
583,376, H. Hoppe, May 25, 1897;
648,066, J. S. Bullock, Apr. 24, 1900;
658,812, D. G. Smyth, Oct. 2, 1900;
789,881, P. F. Rice, May 16, 1905;
824,920, J. H. Erickson, July 3, 1906.

[fol. 29] Foreign Patents

British, 1260 of 1877 to James Hird.
British, 25929 of 1897 to Thomas Forknall.

Printed Publication

Los Angeles Daily Times, issue of Nov. 4, 1903, published daily at Los Angeles, Calif.

Prior Users, Inventors, Discoverers and Those Having Prior Knowledge of the Alleged Invention, With Their Addresses, Which Generally are Also the Places Where the Uses Occurred and Knowledge and Discovery Had and Work Done

The Chandler & Price Company, Cleveland, O.
Percy F. Rice, Tustin, Calif.
American Type Founders Co., Los Angeles, Calif.
Humana Company, Newark, N. J.

The foregoing individuals as well as the officers, employees and agents of the named companies had knowledge of, had discovered, invented, used and disclosed to others the alleged improvements of the patent in suit at the places

given and elsewhere in the United States and elsewhere before the alleged invention or discovery thereof by said Wells & Hunter, and had been used publicly and had published said alleged improvements at the places named and elsewhere in the United States and other countries for more than two years prior to the application of the patent in suit.

[fol. 30] XII

Defendants, further answering, charge and allege that the Letters Patent in suit and every part and claim thereof are invalid and of no force and effect in law for the following reasons:

(a) Because the description and claims thereof are not in such full, clear, exact and concise terms as required by statute and as will enable persons skilled in the art to construct and use the alleged improvements covered by said Letters Patent, and fail to disclose an operative mechanism and device;

(b) Because the alleged improvements of the patent in suit are not the result of the exercise of inventive faculty but involve nothing more than mere mechanical skill and practice;

(c) Because the said Letters Patent in suit and each and every part and claim thereof are void for want of patentable novelty and invention;

(d) Because the disclosure of the patent in suit is inoperative and wholly unusable and impractical;

(e) Because the platen printing press used by defendant, Joseph Freeman, Inc., and charged to infringe the patent in suit, is the result of the work of the engineers and employees of defendant, The Chandler & Price Company, in connection with their knowledge of the existing art avail-
[fol. 31] able to them and the public generally long prior to any alleged invention or discovery by said Wells & Hunter, and in particular, in so far as any automatic feed or delivery devices are utilized in said printing press, such devices are substantially identical with those shown and described in United States Letters Patent No. 789,881, which issued to Percy F. Rice under date of May 16, 1905, and have long since expired.

XIII

Defendants charge and allege that the platen printing press herein complained of is entirely different in design, principle and construction from those involved in the prior litigation referred to in the bill of complaint, and that the plaintiff in this suit was the actual defendant in the aforesaid suit of Miller Saw-Trimmer Company vs. Otto R. Schifffarth, and well knows that patent No. 1,863,200, herein sued on, is invalid and of no force and effect in law as the result of the investigations which it made when it was defending against said patent, and that it has since suppressed and hidden the information which was then secured.

Defendants further allege that in said prior litigation the plaintiff therein misinformed the Court as to the value and practicability of the paper feeding and delivery mechanism for printing presses shown and described in the aforesaid Rice patent No. 789,881, of 1905, and the defendant therein failed to offer proof as to the prior successful public use of said Rice printing press as constructed and operated within the United States prior to 1905, and further failed to [fol. 32] show to the Court, among other things, as is the fact, that said printing press was thus successfully and publicly operated and did in its operation feed the paper substantially parallel to the platen and to positioning stops; that subsequent to the final hearing in the aforesaid suit, the plaintiff herein, who defended said suit, did take, for use on its behalf in a suit brought in the United States District Court, Southern District of New York, against it, based on the same patent, viz., E 42-1, Miller Saw Trimmer Co. vs. Brandtjen & Kluge, Inc., the testimony of Percy F. Rice, patentee of said Rice patent, which testimony was never filed, but which showed, as defendants are informed and believe, that said Rice printing press had been successfully used publicly in the United States prior to 1905, and that promptly after the taking of such testimony, the parties to such last mentioned suit compromised and settled the same.

Wherefore, defendants deny that plaintiff is entitled to any of the relief sought and prayed for in the bill of complaint; deny plaintiff's right to injunction, damages, profits and costs, and pray that the bill of complaint be dismissed for want of equity at the costs of plaintiff.

Set-Off or Counter-Claim

Defendants, further answering, say by way of set-off or counter-claim:

XIV

Heretofore and prior to April 18, 1921, Charles F. Root, of Cleveland, Ohio, was the true, original and first inventor of certain new and useful Improvements in Sheet Trans- [fol. 33] ferring Mechanism for Printing Presses, not known or used by others in this country before his said invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, or more than two years prior to his application for patent therefor, and not in public use or on sale in this country for more than two years prior to his application for patent therefor, and no application for a foreign patent for said invention having been filed more than twelve months prior to the filing of the application in this country, and the same having not been abandoned, said Charles F. Root made due application in writing to the Commissioner of Patents of the United States for a patent on said improvements within the time and under the conditions prescribed by law.

XV

In further compliance with the requirements of the Statutes and Rules of the Patent Office of the United States then in force, said original application was divided and a divisional application filed August 12, 1930, and having duly prosecuted said application, all requirements of such Statutes then in force and applicable to said application having been complied with, and The Chandler & Price Company, an Ohio corporation, defendant and counter-claimant herein, being then the owner by assignment of all right, title and interest in and to said application and improvements, there were duly granted and issued to said The Chandler & Price Company, on the said divisional application of Charles F. Root, Letters Patent of the United [fol. 34] States No. 1,849,314, dated March 15, 1932, whereby there was secured to said The Chandler & Price Company, its successors and assigns, for the term of seventeen years from March 15, 1932, the exclusive right to make, use and sell the said improvements, as will appear from

said Letters Patent, or a copy thereof, to be produced in Court, of which profert is hereby made.

XVI

Said The Chandler & Price Company, defendant and counter-claimant herein, has ever since the date of issue of the aforesaid Letters Patent No. 1,849,314, continued to own and does now own all right, title and interest in and to said Letters Patent and in and to the invention and improvements covered thereby, and in and to all profits and damages and all right of action for recovery of same by reason of past infringement of said Letters Patent.

XVII

The invention and improvements described and claimed in said Letters Patent are of great value and utility; said defendant and counter-claimant has expended large sums of money in adapting and perfecting the same and introducing them into public use, and has made, used, and sold to be used, sheet transferring mechanism for printing presses embodying said improvements in large number, and is ready and willing and fully prepared to meet all market demands for such sheet transferring mechanism; [fol. 35] and said defendant and counter-claimant has given due and sufficient notice to the public that the aforesaid sheet transferring mechanism is patented under and by the aforesaid Letters Patent, and in particular by letter addressed to this plaintiff, and by it duly received, has called attention to said Letters Patent and informed said plaintiff that sheet transferring mechanism which it is manufacturing, using and selling constitutes an infringement of said Letters Patent and requested plaintiff to desist from such infringement.

XVIII

Said defendant and counter-claimant is informed and believes, and therefore avers, that within six years last prior to the filing of this bill of complaint, the plaintiff herein has, within the Eastern District of New York, and elsewhere in the United States, manufactured, sold, used and caused to be used, sheet transferring mechanism for printing presses employing the improvements described and claimed in said Letters Patent, and particularly claims

1, 3 and 5 thereof, unlawfully and without license of said defendant and counter-claimant, and in infringement of the said Letters Patent and the rights of said defendant and counter-claimant thereunder, and threatens to continue said infringement. But for said infringement by plaintiff and threat to continue the same, said defendant and counter-claimant would now be able to make and sell printing presses equipped with the aforesaid improved sheet trans- [fol. 36] ferring mechanism with greater profit and advantage, and if plaintiff's infringement should continue, said defendant and counter-claimant would be irreparably damaged. Plaintiff has profited by said infringement, but in an amount which said defendant and counter-claimant cannot ascertain without an accounting by the plaintiff. Said defendant has no adequate remedy at law.

Wherefore, defendants pray:

1. That a permanent injunction be issued by this Court forever enjoining and restraining the plaintiff, its officers, attorneys, agents, servants, workmen, employees, and each of them, from infringing or contributing to the infringement of said Letters Patent No. 1,849,314.

2. That the plaintiff be ordered by this Court to account for and to pay to said defendant and counter-claimant all profits, gains and advantages had by the said plaintiff by reason of any infringement of the said Letters Patent, and that this Court assess, or cause to be assessed, and cause to be paid to the defendants, the damages which they respectively have suffered by reason of any infringement of said Letters Patent by the plaintiff.

3. That the plaintiff be ordered to pay all of the costs, disbursements and charges arising out of this counter-claim.

4. That the Court grant such other and further relief as the case may require.

[fol. 37] Answer under oath is waived.

Joseph Freeman, Inc., by Jos. Freeman, President. The Chandler & Price Company, by D. W. Frackelton, Vice-President. John F. Ryan, Solicitor for Defendants. Wallace R. Lane, Jno. F. Oberlin, of Counsel.

Duly sworn to by D. W. Frackelton. Jurat omitted in printing.

[fol. 38] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

[Title omitted]

MOTION TO DISMISS INTERVENER'S COUNTERCLAIM—Flied July 20, 1934

Brandtjen & Kluge, Inc., plaintiff herein, by Pennie, Davis, Marvin & Edmonds, its solicitors, moves (1) that the counterclaim filed by Chandler & Price Co., Intervener, on July 9th, 1934, be dismissed and (2) that the Order of this Court, entered June 30th, 1934, permitting Chandler & Price Co., to intervene, be vacated and set aside.

1. As grounds for its motion to dismiss the counterclaim, plaintiff states:

(a) The Intervener is without right to file a counterclaim for an independent cause of action to which the defendant, Joseph Freeman, Inc., is a stranger.

(b) The counterclaim and proceedings thereon would [fol. 39] confuse and delay the suit on the cause of action set forth in the bill of complaint.

2. As grounds for the motion to vacate the order permitting intervention, plaintiff states:

(a) The order was entered on a petition which did not disclose the real purpose of the intervention.

(b) The order was entered on the basis of a supposed necessity in the petitioner, which is not the fact.

(c) The intervention has already delayed and will continue to delay the plaintiff's suit against Freeman, Inc., to the serious prejudice of the plaintiff, and in plaintiff's submission the intervention is calculated to bring about such delay and to postpone an adjudication of the question of infringement of plaintiff's patent in the use of petitioner's make of machine.

Pennie, Davis, Marvin & Edmonds, Solicitors for Plaintiff.

New York, N. Y., July 19, 1934.

[fol. 40] In United States District Court, Eastern District of New York

Equity. No. 7237

Brandtjen & Kluge, Inc., Plaintiff,

against

Joseph Freeman, Inc., and The Chandler & Price Company, Defendants

August 10, 1934.

Pennie, Davis, Marvin & Edmonds, for Plaintiff for Motion; Dean S. Edmonds, and Jn. Hoxie, of counsel;
John F. Ryan, for Chandler & Price Co.

Opinion, Campbell, D. J.—Filed August 10, 1934

Campbell, D. J.:

These are two motions made by the plaintiff.

1. To dismiss the counterclaim filed by Chandler & Price Co., Intervener.

2. To vacate order entered on June 30, 1934, allowing Chandler & Price Co. to Intervene.

The second motion should be addressed to Judge Inch, who made the order. I therefore respectfully refer that [fol. 41] motion to him, and if the Clerk be communicated with at once, he can probably arrange for its being heard or considered on submission.

We will now consider the first motion.

This suit was brought by the plaintiff against Joseph Freeman, Inc., a user of a printing press which plaintiff alleges infringes its Wells and Hunter patent in suit.

Chandler & Price Co., the manufacturer of the printing press used by the defendant Freeman, which plaintiff alleges infringes its patent, obtained from one of the judges of this Court permission to intervene in such action.

The intervener, Chandler & Price Co., counter-claimed on the basis of the charge that plaintiff infringes the Root patent, owned by the intervener.

The defendant Freeman has no interest in this Root patent, and does not join in the counterclaim.

The counterclaim is not available to Freeman, and is made by the intervener alone.

As to the first motion, I am convinced that the intervener must take the suit as he finds it.

This principle is stated in 11 Encyclopedia of Pleading and Practice (pp. 509-510) as follows:

"5. Intervener Must Take Suit as he Finds it. An intervener in a suit between other parties must accept such suit as he finds it, and is bound by the record of the case at the time of his intervention. He cannot raise an issue as to whether the proceedings are regular, nor can be plead exceptions having for their object the dismissal of the ac- [fol. 42] tion. He cannot raise new issues in the suit, nor insist upon a change in the form of the proceedings. An intervener cannot exercise any rights which are limited to the parties to the action."

A note to Equity Rule 30 of Hopkins' Federal Equity Rules, 6th Ed., says:

"Defendant means original parties defendant and not intervening parties defendant; an intervener cannot seek affirmative relief that was not available to the original parties defendant." Allington v. Shevlin-Hixon Co., 2 F. (2d) 747, 749.

It has been held and I know of no decision to the contrary, that the right to file a cross-bill or counterclaim is limited to the defendants named in the bill, and does not extend to an intervener. Curran v. Charles Car Co., 32 F. 835; Atlas Underwear Co. v. Cooper Underwear Co., 210 F. 347; Leaver v. K. & L. Box & Lumber Co., 6 F. (2d) 666; De Sousa v. Crocker First Nat. Bank, 23 F. (2d) 118; Tretolite Co. v. Darby Petroleum Corporation, 5 F. Supp. 445; Whittaker v. Brictson Mfg. Co., 43 F. (2d) 485 at 490; Powell v. Leicester Mills, 92 Fed. 115.

In the Cyclopedia of Federal Procedure, Vol. 3, Ch. 12, Section 932, the rule is stated as follows:

"The range of activity of an intervener in the prosecution or defense of the interest he is permitted to assert is [fol. 43] necessarily as extensive as, but not greater than, that allowed the original parties to the suit. The interven-

tion does not enlarge the scope or vary the nature of the litigation, nor will the Court permit the intervener to file a pleading which would have that effect."

While the precise question presented here has not, so far as I can find, been ruled upon in this Circuit, the governing principle, however, has been applied here in Prince v. Childs Co., 23 F. (2d) 605, 607.

The intervening defendant cites Kessler v. Eldred, 206 U. S. 285, and General Electric Co. v. Marvel Co., 287 U. S. 430, both of which determine jurisdictional questions and are not in point.

The first motion is granted. Settle order on notice.

Marcus B. Campbell, U. S. D. J.

[fol. 44] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DISMISSING COUNTERCLAIM—Filed September 7, 1934

1. This cause having come on to be heard on plaintiff's motion to dismiss the counterclaim filed by Chandler & Price Co., Intervener, and counsel having been heard and briefs having been filed, it is upon due consideration,

Ordered, adjudged and decreed that the counterclaim filed herein by the intervener, Chandler & Price Co., be and same hereby is dismissed without prejudice.

ORDER ON PLAINTIFF'S MOTION TO VACATE ORDER ALLOWING INTERVENTION

2. Plaintiff's motion to vacate the order entered herein on June 30, 1934, allowing Chandler & Price Co. to intervene, having come on for hearing in the absence of Judge [fol. 45] Inch who entered the order, the said motion is respectfully referred to Judge Inch.

Marcus B. Campbell, United States District Judge.

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

[Title omitted]

MOTION FOR STAY OF PROCEEDINGS—Filed September 21, 1934

The Chandler & Price Company, defendant herein, by John F. Ryan, its solicitor, moves that all further proceedings in this Court may be suspended and stayed until the final determination of the appeal taken by said defendant from the order and decree entered by this Court under date of September 7, 1934, dismissing said defendant's counter-claim theretofore filed in this cause and thereby refusing the injunction prayed for in said counter-claim.

As grounds for the foregoing motion, said defendant states:

1. As this Court is advised, by order entered under date of June 30, 1934, The Chandler & Price Company was [fol. 46] granted leave to intervene in this suit as a party defendant. Thereupon, under date of July 9, 1934, within the time for filing answer or other defense as last set by stipulated order of this Court, Joseph Freeman, Inc., the original defendant, and The Chandler & Price Company, thus added as a party defendant, filed their joint answer. Included in such answer, under the provisions of Equity Rule 30, was a set-off or counter-claim against the plaintiff charging infringement by the latter of United States Letters Patent No. 1,849,314, which is owned by defendant, The Chandler & Price Company.

2. The Root patent No. 1,849,314, upon which said counter-claim is based, relates to the same subject-matter as does the Wells & Hunter patent in the bill of complaint No. 1,363,200. Thus, said Root patent is for improvements to mechanism for transferring, i. e., feeding or delivering, sheets for printing presses, more particularly so-called platen printing presses, and said Wells & Hunter patent likewise relates to improvements in automatic feed and delivery mechanism for platen printing presses. The proofs which defendants, expect to take on the issues raised by the bill of complaint will be pertinent in substantial part

to the issues raised by said counter-claim and to sever the trial of these issues by requiring a separate suit to be brought on said Root patent will to a corresponding extent involve a duplication of time and expense.

3. Subsequently, upon motion of plaintiff, the aforesaid counter-claim of defendant, The Chandler & Price Company, was by order and decree of this Court, entered under [fol. 47] date of September 7, 1934, dismissed without prejudice.

4. No other or further proceedings have been had to date in this cause. No testimony has been taken by either party by deposition or otherwise; and the cause has not yet been set for trial.

5. As more fully set forth in the petition of The Chandler & Price Company for leave to intervene (see paragraph 4), as a result of which such leave was granted and petitioner made a party defendant by the aforesaid order of June 30, 1934, said The Chandler & Price Company is the real and Joseph Freeman, Inc., merely the nominal defendant, as evidenced by the correspondence interchanged between counsel for plaintiff and defendant prior to the filing of this suit and particularly by the fact that at the time of filing the suit, plaintiff's counsel furnished counsel for The Chandler & Price Company a copy of the bill of complaint as filed.

6. If a stay of proceedings is not granted and upon defendant's appeal the aforesaid order and decree dismissing its counter-claim should be reversed, a separate trial of the issues raised by said counter-claim will be necessary, requiring additional time of this Court and entailing additional expense to the parties, and particularly to the defendants, in contradistinction to trying all the issues raised by said original bill and counter-claim together.

The Chandler & Price Company, by John F. Ryan,
Its Solicitor.

New York, N. Y., September 21, 1934.

[fol. 48] In United States District Court, Eastern District of New York

[Title omitted]

Order Staying Trial—Filed September 29, 1934

This cause having come on to be heard on the motion of defendant-intervener, The Chandler & Price Company, to stay proceedings until the final determination of a proposed appeal from the Interlocutory Order and Decree entered in this cause on September 7, 1934, dismissing said defendant-intervener's counterclaim theretofore filed in this cause, it is therefore,

Ordered, adjudged and decreed that the trial of this action be stayed pending the determination of defendant-intervener's appeal from the order of September 7, 1934, dismissing the counterclaim, but that all other proceedings preliminary to trial shall remain unaffected by this stay, and further that if the said appeal shall not be prosecuted with all reasonable diligence this order shall be vacated on motion of the plaintiff.

Marcus B. Campbell, United States District Judge.

Dated September 29th, 1934.

Security Waived on the Stay.

Pennie, Davis, Marvin & Edmonds, Solicitors for Plaintiff.

[fol. 49] In United States District Court, Eastern District of New York

[Title omitted]

Petition for Appeal—Filed September 29, 1934

The Chandler & Price Company, defendant in the above entitled cause, being aggrieved by the interlocutory order and decree entered in this cause on September 7, 1934, dismissing defendant's counter-claim theretofore filed in this cause and thereby refusing the injunction prayed for in said counter-claim, hereby appeals from said order and decree to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in Assignment of

Errors as filed herewith, and prays that its appeal be allowed and citation issued, as provided by law, and a transcript of the record and proceedings upon which said order is based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Second Circuit.

The Chandler & Price Company, by John F. Ryan,
Its Solicitor.

[fol. 50] ALLOWANCE OF APPEAL

Appeal allowed September 29th, 1934.

Marcus B. Campbell, U. S. D. J.

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS—Filed September 29, 1934

Now comes The Chandler & Price Company, defendant in the above entitled cause, and says that in the interlocutory order and decree filed in this cause on September 7, 1934, the Court erred in the following particulars, to-wit:

1. In dismissing defendant's counter-claim and thereby refusing the injunction prayed for therein.

[fol. 51] 2. In not allowing defendant to set up its counter-claim with prayer for injunction.

3. In holding that said defendant, after being granted leave to intervene in said suit as a party defendant, must take the suit as he finds it.

4. In holding that the right to file a cross-bill or counter-claim is limited to the defendants named in the bill and does not extend to an intervening defendant.

5. In not ruling that defendant herein was entitled to set up his counter-claim and prayer for injunction.

The Chandler & Price Company, by John F. Ryan,
Its Solicitor.

[fol. 52 & 53] Bond on appeal for $250.00 approved and filed Sept. 29, 1934, omitted in printing.

[fols. 54 & 55] Citation, in usual form, showing service on Pennie, Davis, Marvin & Edmonds, filed Oct. 2, 1934, omitted in printing.

[fol. 56] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

[Title omitted]

PRÆCIPE—Filed Sept. 29, 1934

To the Clerk of the United States District Court for the Eastern District of New York:

SIR:

The defendant herein, The Chandler & Price Company, respectfully requests that you prepare a transcript of the following papers, orders and proceedings filed and had in this cause, for use on appeal to the United States Circuit Court of Appeals for the Second Circuit, to-wit:

1. Docket page showing record of entries made herein.
2. Bill of complaint.
3. Petition of The Chandler & Price Company for leave to intervene, including Exhibits 1 and 2 attached to said petition.

[fol. 57] 4. Memorandum opinion on petition for leave to intervene.

5. Order granting leave to intervene.
6. Answer, including set-off or counter-claim.
7. Motion to dismiss intervener's counter-claim and to vacate order allowing intervention.
8. Memorandum opinion on motion to dismiss intervener's counter-claim and to vacate order allowing intervention.
9. Order dismissing counter-claim, etc.
10. Petition for appeal, and Order allowing appeal.
11. Assignment of errors.

12. Motion staying proceedings.
13. Order staying trial.
14. Bond on appeal.
15. Citation.
16. Præcipe.

Respectfully, John F. Ryan, Solicitor for Defendants.

Service of the foregoing Præcipe acknowledged this 29th day of September, 1934.

Pennie, Davis, Marvin & Edmonds, Attorneys, and of Counsel for Plaintiff.

[fol. 58] In United States District Court, Eastern District of New York

[Title omitted]

Stipulation as to Transcript of Record

It is hereby stipulated and agreed, that the foregoing is a true copy of the transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated October —, 1934.

John F. Ryan, Attorney for Appellant. Pennie, Davis, Marvin & Edmonds, Attorneys for Plaintiff.

On reading the foregoing consent of the attorneys for the respective parties herein, it is ordered that the foregoing printed record be filed in lieu of the original papers for the purpose of certifying a record on appeal.

Dated October —, 1934.

U. S. D. J.

[fol. 59] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 60] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1934

Argued Jan. 16, 1935. Decided Feb. 4, 1935

No. 219

BRANDTJEN & KLUGE, INC., Appellee,

v.

JOSEPH FREEMAN, INC., Appellee,

and

THE CHANDLER & PRICE COMPANY, Appellant

Before L. Hand, Swan, and Chase, Circuit Judges.

Appeal from the District Court of the United States for the Eastern District of New York

Appeal by an intervening defendant in a patent suit, from a decree of the District Court for the Eastern District of New York dismissing its counterclaim.

Wallace R. Lane, of Chicago, Ill., for appellant.
Dean S. Edmonds, of New York City, for appellee.

L. HAND, Circuit Judge:

The plaintiff sued the Freeman Company as a user and infringer of its patent for improvements in the automatic feed and delivery of platen printing presses. The Chandler & Price Company, which had made the infringing press and sold it to the Freeman Company, intervened as defendant, having taken over the defense of the suit. Thereafter it filed a counterclaim, alleging that the plaintiff was infringing a patent owned by itself for improvements in the sheet transferring mechanism of printing presses. It is to be assumed that a single press may, and does, embody the features claimed in both patents as an invention. The plaintiff moved to dismiss the counterclaim upon the ground that an intervener may not under the thirtieth Equity Rule (28 USCA § 723) inject into the main suit a controversy between the plaintiff and himself, to which the original de-

fendant is not a party. The judge so held and the intervener appealed.

If the plaintiff had sued the Chandler & Price Company originally, the thirtieth rule would have authorized the counterclaim. Leman v. Krentler-Arnold Co., 284 U. S. 448, 52 S. Ct. 238, 76 L. Ed. 389; General Electric Co. v. Marvel, etc., Co., 287 U. S. 430, 53 S. Ct. 202, 77 L. Ed. 408. The question remained open so long as it did because of a doubt whether the plaintiff by bringing suit in a forum prescribed in the defendant's interest, by such statutes for example as sections 48, 51, 52, 53 of the Judicial Code (28 USCA §§ 109, 112, 113, 114), surrendered his own corresponding privilege. In the end the defendant won for two reasons; he has himself a special interest in pressing the cross-suit in the same forum as the main suit; and it is fair to impose upon a plaintiff a surrender of his privilege to be sued elsewhere. The defendant's special interest in addition to the general desirability of settling all disputes at one time, is that he so avoids the necessity of seeking the plaintiff away from his own habitation or place of business, where the main suit has of necessity been brought. On the other hand the plaintiff presumably knows what other disputes are pending between him and the defendant, and by selecting him for attack, may be charged with the risk of [fol. 61] meeting a reprisal. Neither of these considerations apply when a party intervenes as defendant. It may indeed happen that the forum is one in which the intervener could himself be sued, and is therefore one presumptively suited to his convenience, but that is a mere chance. Normally there is no reason why he should not go where the statutes require him to go. On the other hand the plaintiff has not chosen him as an antagonist; on the contrary he has intruded himself into the dispute. It is not fair to charge the plaintiff with notice of such cross-suits as may be so forced upon him; he cannot be said to have accepted their hazard when he sued the original defendants.

It is of course true that at times the intervener is practically forced into the suit, as much as though the plaintiff sought him out and served him. Conceivably it might be desirable to give the court discretion in such cases to treat the situation as though the plaintiff had joined him in invitum. But there is no warrant for such a treatment of the rule as it stands, and, although the reasons have not

always been clear, those District Courts that have passed on the point, with one dubious exception, have uniformly dismissed such counterclaims. Curran v. St. Charles Car Co. (C. C.) 32 F. 835; Powell v. Leicester Mills (C. C.) 92 F. 115 (semble); Atlas Underwear Co. v. Cooper Underwear Co. (D. C.) 210 F. 347, 355; Allington v. Shevlin-Hixon Co. (D. C.) 2 F. (2d) 747, 749 (semble); Leaver v. K. & L. Box & Lumber Co. (D. C.) 6 F. (2d) 666; Borne Scrymser Co. v. Gaffney Mfg. Co. (D. C.) 5 F. Supp. 405 (semble), affirmed 68 F. (2d) 104 (C. C. A. 4). The exception is U. S. Expansion Bolt Co. v. H. G. Kroncke Hardware Co. (D. C.) 216 F. 186, affirmed 234 F. 868 (C. C. A. 7), where the actual decision was flatly contra. However, both courts were not there really concerned with the question now before us, but with how far a plaintiff ever abandons his privilege when he sues; a matter which the Supreme Court had not then settled. Mr. Lane has furnished us with copies of the brief on the appeal from which it does indeed appear that the argument depended in part upon the fact that the defendants were interveners, but it would be wholly gratuitous to impute to the Circuit Court of Appeals any intention to decide the point.

It is true that the language of the rule will bear the opposite construction; "defendant" is apt enough to include "intervening defendant." It is also true that the thirty-seventh rule (28 USCA § 723) does not stand in the way. A counterclaim "recognizes" the "propriety" of the bill; presupposes it indeed, since without the bill the intervener could acquire no jurisdiction over the plaintiff. Again a counterclaim is "subordinate" to the bill; both may go to decree regardless of each other. A patentee does not get from his patent the right to make, vend and use, but only the right to stop others. Crown Die & Tool Co. v. Nye Tool & Machine Works, 261 U. S. 24, 34, 35, 43 S. Ct. 254, 67 L. Ed. 516. An injunction upon the defendant's patent does not therefore trench upon his own patent. Thus in the end our choice depends upon what we deem to be the balance of advantage. We cannot see that it dips clearly enough to the defendant's side to disregard the decisions we have cited. Besides, there is something to be said for the notion that a man should be able to keep his suit in his own control, unless good reason be shown why he should not. Although it is in general desirable that as much litiga-

tion as possible should be cleared up at once, other interests at times may prevail. Having to choose here between an interpretation which will let in all such counterclaims or shut them all out, we choose the second.

Decree affirmed.

[fol. 62] NNITED STATES CIRCHIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 11th day of February, one thousand nine hundred and thirty-five.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

BRANDTJEN & KLUGE, INC., Plaintiff-Appellee,

vs.

JOSEPH FREEMAN, INC., Defendant-Appellee,

and

THE CHANDLER & PRICE COMPANY, Defendant-Appellant

Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 63] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Brandtjen & Kluge, Inc., vs. Joseph Freeman, Inc., et al. Order for Mandate. United States

Circuit Court of Appeals, Second Circuit. Filed Feb. 11, 1935. William Parkin, Clerk.

[fol. 64] United States Circuit Court of Appeals, Second Circuit. Filed Feb. 19, 1935. William Parkin, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Appeal No. 219

BRANDTJEN & KLUGE, INC., Plaintiff-Appellee,

vs.

JOSEPH FREEMAN, INC., Defendant-Appellee,

and

THE CHANDLER & PRICE COMPANY, Defendant-Appellant

PETITION FOR REHEARING

Wallace R. Lane, John F. Oberlin, John F. Ryan, Solicitors and of Counsel for Appellant.

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[fol. 67] United States Circuit Court of Appeals for the Second Circuit

Brandtjen & Kluge, Inc., Plaintiff-Appellee,

vs.

Joseph Freeman, Inc., Defendant-Appellee,

and

The Chandler & Price Company, Defendant-Appellant

Petition for Rehearing

Appellant, The Chandler & Price Company, respectfully petitions this court for a rehearing herein and for reasons submits that the opinion fails to recognize and give effect

to controlling decisions of the Supreme Court and incorrectly applied the law in the following particulars as shown by its opinion:

1. The opinion imports into Equity Rule 30 a limitation inconsistent with the express language of the rule and its purpose and scope as explained by the Supreme Court in Lemon v. Krentler-Arnold Co., 284 U. S. 448; General Electric Co. v. Marvel, 287 U. S. 430, 432, and American Mills Co. v. American Surety Co., 260 U. S. 360.

Appellant, having been admitted and become a defendant through intervention, should be treated as a defendant for [fol. 68] all purposes of that rule. The discretionary provision of Rule 37 was served when the petition to intervene was granted. There is no authority in the Equity Rules or elsewhere for transferring or importing it into Rule 30 by making a distinction between an original defendant and a defendant who entered by intervention where none is indicated.

If there were provision in Rule 30 for the exercise of discretion as the court, in effect, holds, it should be in appellant's favor to permit the trial of all the issues between the parties and the entry of a "single decree" determining the merits of the cause of action alleged in the complaint and the counterclaim.

2. The opinion indicates a failure to appreciate the true scope and character of the controversy and consequent misapplication of Equity Rule 30.

The court recognized

"that a single press may, and does, embody the features claimed in both patents as an invention."

If that be so, a single transaction may and does embrace both patents. The case, therefore, is within the "must" clause of Rule 30, which does not except a defendant merely because he entered by the route of intervention. Moore v. N. Y. Cotton Exchange, 270 U. S. 593, 609 et seq.

The real controversy, indeed, has even broader aspects. It is a trade controversy. Appellee and appellant are competitors. By suing a user thereof appellee has questioned appellant's right to make, sell and use the invention of its patent and the correlative right to exclude others from so doing, in a concrete instance. If appellant is to protect

[fol. 69] that right, it cannot sit back and indulge the sniping tactics of a competitor exemplified in the bill of complaint. It has no alternative but to defend the suit and promptly assert its rights. Appellant should be regarded as in the case in invitum. That the controversy assumes greater proportions than appellee intended and embraces two patents instead of one ought not to be a controlling factor necessitating the dismissal of the counterclaim.

Appellant, through its counterclaim, merely seeks to bring the controversy in these broader aspects before the court for settlement in a single decree and in a jurisdiction of appellee's own choosing. This course seems to be clearly within the scope and purpose of rule 30 as interpreted by the Supreme Court in the cases above cited.

3. The "balance of advantage" ought not to lie in any mere count of cases of uncertain reasoning and harking back to doctrines discarded by the adoption of the Federal Equity Rules in 1912. Of the six cases cited in the opinion on the side of the court's holding only one can fairly be said to be pertinent in fact and that reverts to the obsolete practice of the cross bill. Two antedate the adoption of the Equity Rules and reflect an archaic doctrine. The others contain only dicta which seem provincial.

4. The court appears to have misunderstood the opinions of the District Court and the Circuit Court of Appeals for the Seventh Circuit in Expansion Bolt Co. v. Kroncke Hdw. Co. (W. D. Wis.) 216 Fed. 186, aff'd (C. C. A. 7) 234 Fed. 868, to which it refers as a "dubious exception." Not only was the question here present argued and submitted in that [fol. 70] case, as this court is aware, but the opinions of both courts in that case plainly proceed on the assumption that the right of an intervening defendant to file a counterclaim is as broad as that of an original defendant and is not limited to a counterclaim which would have been available to the original defendant if there had been no intervention. Indeed, the conclusion is inescapable that in the Expansion Bolt case both courts were impressed with the obviousness of that interpretation of Rule 30 which would permit matters of the character presented by the counterclaim as well as by the bill of complaint in that case—and in the instant case—

"to be all disposed of in one suit as they relate to questions very closely connected together."

5. The opinion is inconsistent in premise and conclusion in important respects:

It admits the susceptibility of Rule 30 to the interpretation for which appellant contends and that so interpreted appellant's counterclaim is proper; it admits the desirability of importing into the rule the saving of an exercise of discretion by the court in cases where—

"The intervener is practically forced into the suit,"

as here, but states that

"there is no warrant for such a treatment of the Rule as it stands;"

notwithstanding,

"upon what we deem to be the balance of advantage,"

[fol. 71] it does in fact interpret the rule adversely to appellant's contention by importing into the rule a qualification distinguishing a defendant who entered by intervention from an original defendant and, in effect, the saving of an exercise of discretion by the court to limit defendant who has entered by the route of intervention to a counterclaim available to an original defendant, though there be no language in the rule susceptible of such interpretation. Thus the court in effect does what it disapproves as unwarranted.

6. The issue here is more than one of mere private rights but going as it does to an important question of practice, involves the larger question of public rights. It is a matter of public policy of more than passing moment how a trade controversy of the character here presented shall be dealt with; whether narrowly and piecemeal, with perhaps a too tender regard for the attacking litigant, or liberally with a view to expeditious, complete settlement. This cannot be too carefully considered in the establishment of a precedent in this circuit on the point presented.

Wherefore, appellant respectfully requests a careful reading and consideration of this petition and brief in support thereof by each member of the court who sat before,

and prays a rehearing to the end that justice may be done between the parties as well as in the interest of the public;

Appellant also prays that in the event the rehearing sought is not allowed, an order may be entered staying the issue of Mandate and all proceedings herein so as to give appellant time and opportunity to prepare and file in the [fol. 72] Supreme Court of the United States, a petition for writ of certiorari.

Respectfully submitted, The Chandler & Price Company, Defendant-Appellant, by Wallace R. Lane, Its Attorney.

We hereby certify that in our opinion the foregoing petition is well taken in law and in fact, is filed in good faith and should be granted.

Wallace R. Lane, John F. Oberlin, John F. Ryan, Solicitors and of Counsel for Appellant.

[fol. 73] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRANDTJEN & KLUGE, INC., Appellee,

against

JOSEPH FREEMAN, INC., Appellee

and

THE CHANDLER & PRICE COMPANY, Appellant.

Before L. Hand, Swan and Chase, Circuit Judges.

ON PETITION FOR REHEARING

Wallace R. Lane, John F. Oberlin and John F. Ryan for the petition.

PER CURIAM: Petition denied.

——, U. S. Circuit Judges.

Filed February 25, 1935.

[fol. 74] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court

Rooms in the Post Office Building in the City of New York, on the 25th day of February, one thousand nine hundred and thirty-five.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

BRANDTJEN & KLUGE, INC., Plaintiff-Appellee,

vs.

JOSEPH FREEMAN, INC., Defendant-Appellee
THE CHANDLER & PRICE COMPANY, Defendant-Appellant

A petition for a rehearing having been filed herein by counsel for the appellant;

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 75] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Brandtjen & Kluge, Inc., vs. Joseph Freeman, Inc., et al. Order. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 25, 1935. William Parkin, Clerk.

[fol. 76] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 75, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Brandtjen & Kluge, Inc., Plaintiff-Appellee, against Joseph Freeman, Inc., Defendant-Appellee, The Chandler & Price Company, Defendant-Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 7th day of March, in the year of our Lord one thousand nine hundred and thirty-five, and of the Independence of the said United States the one hundred and fifty-ninth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

(6084-C)

[fol. 77] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 29, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,437. U. S. Circuit Court of Appeals, Second Circuit. Term No. 11. The Chandler & Price Company, Petitioner, vs. Brandtjen & Kluge, Inc., and Joseph Freeman, Inc. Petition for a writ of certiorari and exhibit thereto. Filed March 25, 1935. File No. 11 O. T. 1935.

(6454-C)